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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~117~~ 130

J. COOKE LONGSTRETH, ASSIGNEE IN BANKRUPTCY OF OSBOURN WATTSON AND JOSEPH B. DE YOUNG, TRADING AS WATTSON & DE YOUNG, PLAINTIFF IN ERROR,

VS.

GEORGE PENNOCK, EXECUTOR OF ABRAHAM L. PENNOCK, DECEASED, AND DAVID SELLERS, SURVIVING TRUSTEE OF THE ESTATE OF MARY LEWIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MARCH 3, 1873.

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SUPREME COURT OF THE UNITED STATES.

No. 411.

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1 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania in the third circuit, of April session, 1872, No. 8.

It is thus contained:

Be it remembered that, on the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and seventy-two, J. Cooke Longstreth, assignee, in bankruptcy, of Osbourn Wattson, and Joseph B. De Young, trading as Wattson and De Young, bankrupts, comes into our said court here and sues forth therefrom a writ of summons on the case against George Pennock, executor of Abraham L. Pennock, deceased, and David Sellers, surviving trustee of the estate of Mary Lewis, which, being read, is in the words following, to wit:

2 UNITED STATES,
Eastern District of Pennsylvania, sct:

[SEAL.] The President of the United States to the marshal of the eastern district of Pennsylvania, greeting:

We command you, that you summon George Pennock, executor of Abraham L. Pennock, deceased, and David Sellers, surviving trustee of the estate of Mary Lewis, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court, to be holden at Philadelphia, on the first Monday of July next, to answer to J. Cooke Longstreth, assignee in bankruptcy of Osbourn Wattson and Joseph B. De Young, trading as Wattson & De Young, bankrupts, in a plea of trespass on the case.

And have you then there this writ.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this twenty-fifth day of June, A. D. 1872, and in the ninety-sixth year of the Independence of the United States.

W. GRIER HIBLER,
Pro. Clerk of Circuit Court, U. S.

3 (Indorsed:) No. 8. Circuit court, April session, 1872. J. Cooke Longstreth, assignee, &c., vs. George Pennock et al. Summons. Case returnable on the first Monday of July next. J. Cooke Longstreth, attorney for plaintiff. $240.

I accept service of this writ for the defendants, and request the clerk to enter my appearance for them.

J. B. TOWNSEND,
Att'y for Defendants.

JUNE 28, 1872.

4 And afterwards, to wit, on the fifth day of July, in the year last aforesaid, the said plaintiff comes into court here and files his declaration, which, being read, is as follows, to wit:

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

George Pennock, executor of Abraham L. Pennock, deceased, and David Sellers, serviving trustee of the estate of Mary Lewis, were attached to answer J. Cooke Longstreth, assignee, in bankruptcy, of Osbourn Wattson & Joseph B. De Young, trading as Wattson & De Young, bankrupts, of a plea of trespass on the case, &c.

And thereupon the said plaintiff complains for that whereas heretofore, to wit, on the first day of June, A. D. 1872, at the district aforesaid, the said defendants were indebted to the said plaintiff in the sum of five thousand dollars, lawful money of the United States of America, for so much money of the said defendants before that time had and received to the use of the said plaintiff; and, being so indebted, they,
5 the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, at the district aforesaid, undertook, & then & there faithfully promised the said plaintiff, to pay him the said last-mentioned sum of money, when they, the said defendants, should be thereunto afterwards requested.

Nevertheless, the said defendants, not regarding their said promise & undertaking, but contriving, & fraudulently intending, craftily & subtly to deceive & defraud the said plaintiff in this behalf, hath not, as yet, paid the said sum of money, or any part thereof, to the said plaintiff, (although often requested so to do,) but the said defendants, to pay the same, have hitherto wholly neglected & refused, & still do neglect & refuse, to the damage of the said plaintiff of ten thousand dollars, and therefore he brings his suit, &c.

6 And afterwards, to wit, on the thirty-first day of August, in the year last aforesaid, the said George Pennock, executor, as aforesaid, and David Sellers, surviving trustee, as aforesaid, by Joseph B. Townsend, esquire, their attorney, come and defend the wrong and injury, when, &c., and say that they did not undertake or promise, in manner and form as the said plaintiff has above thereof complained against them; and of this they, the said defendants, put themselves upon the country, &c.

7 And afterwards, to wit, on the thirteenth day of September, in the year last aforesaid, the respective parties aforesaid, by their attorneys aforesaid, come into our said court here and submit a case stated, which, being read and filed, is as follows, to wit:

In the circuit court of the United States for the eastern district of Pennsylvania, of April sessions, 1872, No. 8:

The following facts are agreed upon as a case stated, to be submitted to the judgement of the court, with leave to either party to sue out a writ of error to such judgement with the same force & effect as though it had been a judgement or a special verdict finding the facts hereby agreed upon.

On the 19th of December, A. D. 1867, Osborn Wattson & Joseph B. De Young rented from Abraham L. Pennock, in his own right, and Abraham L. Pennock and David Sellers, trustees for Mary Lewis, for the term of one year, from January 1, 1868, the front store & counting-room on the first floor of the building No. 533 Market street, in
8 the city of Philadelphia, and other portions of said premises, particularly described in a lease executed by them, a copy whereof is hereunto annexed and made part of this case stated, at an annual rental of five thousand dollars, payable quarterly.

Wattson & De Young entered into possession of said premises under said lease & occupied them as a notion store. Subsequently, another portion of the basement was let to Wattson & De Young, by a verbal agreement, and the rent for the whole for the year commencing January 1, 1870, was reduced to forty-five hundred dollars per annum, the tenants continuing their occupancy of the premises without any new or other written agreement. Before any of the rent hereinafter mentioned fell due, Abraham L. Pennock died, and the right to collect the same vested in the defendants in this suit. The accruing rent was paid in full to July 1, 1870. On the twenty-fifth of January, A. D. 1871, the said Wattson & De Young, who still continued their occupancy of said premises as tenants, were adjudicated bankrupts by the district court of the United States for the eastern district of Pennsylvania, on creditors' petition, filed January 20, 1871; and on the twenty-eighth of March, A. D. 1871, an assignment of the said bankrupt's estate was, under the said proceedings in bankruptcy, duly made to Charles Vezin. The goods of the bankrupts (which were at all times sufficient if destrained on to have satisfied the rent in arrear) remained on the premises, and the same were occupied by the assignee until he had sold the goods, which brought an amount largely exceeding the rent claimed to be in arrear, and until May 24, A. D. 1871, when the premises were surrendered to the defendants in this action. They claimed from the assignee rent of said premises at the rate of forty-five hundred dollars per annum from July 1, A. D. 1870, to May 24, A. D. 1871, allowing a credit for three hundred dollars cash, paid by Wattson & De Young, Dec. 17, A. D. 1870, and eighty-one dollars for painting done by Wattson and De Young prior to the filing of the petition in bankruptcy against them. On the 13th of June, A. D. 1871, the said Charles Vezin, assignee, paid the defendants in this suit out of the funds of the said bankrupt's estate, the sum of three thousand six hundred & fifty-six $\frac{50}{100}$ dollars, and took their receipt therefore, as follows: "Rec., Phila., June 13, 1871, of Charles Vezin, assignee, by Sam'l Dickson, att'y, three thousand six hundred and fifty-six $\frac{50}{100}$ dollars, being in full for rent due by estate of Wattson & De Young, from July 1, 1870, to date of filing petition, and also from that date to surrender of store for occupation of same by assignee, according to annexed statement; and we hereby agree that, in case the payment on acc. of the estate shall be disallowed in whole or in part, we will refund so much as may be necessary to indemnify the assignee in case notice shall be given to us, so that we may have opportunity to substantiate our claim, which we hereby guarantee to be just, true, and lawful.

"GEORGE PENNOCK,
"*Executor of Abraham L. Pennock, dec.*
"DAVID SELLERS,
"*Surviving Trustee of Estate of Mary Lewis.*"

'*Wattson & De Young, bankrupts, to George Pennock and Abraham L. Pennock, surviving executor of Abraham L. Pennock, deceased, and David Sellers, trustee for Mary Lewis,*

Dr.

"1870.		
"10 mo. 1.	One quarter's rent of store on first floor 533, Market street, &c., due this date,	$1,125 00
"1871.		
'1 mo. 1.	One quarter's rent of ditto, due this date	1,125 00
" 20.	19 days rent of ditto, to this date	237 50
		"2,487 50

CR.

"1870.	
"12 mo. 17. By cash on account	300 00
	"2,187 50
"Claim on account of painting, allowed by agreement	81 00
	"$2,106 50

11 "*Charles Vezin, assignee of Wattson & De Young, to George Pennock & Abraham L. Pennock, surviving executor of Abraham L. Pennock, deceased, and David Sellers, trustee for Mary Lewis, Dr.*

"1871.	
"4 mo. 1. One quarter's rent of store on first floor, 533 Market street, &c., less 19 days, due this date	$887 50
"5 mo. 24. One month, 23 days rent of ditto, to this date	662 50
	"$1,550 00"

A vacancy in the assigneeship of the bankrupts' estate of Wattson & De Young having occur'ed by reason of the absence of Charles Vezin, the plaintiff in this action was appointed assignee of said bankrupts' estate, and an assignment thereof was duly made and delivered to him October 26, 1871. The said assignee, plaintiff in this action, made a written demand on the defendants in this action, as follows:

"PHILADELPHIA, No. 125 S. 7TH ST., *June* 20, 1872.

"To George Pennock, executor of Abraham L. Pennock, dec., & David Sellers, surviving trustee of estate of Mary Lewis:

"GENTLEMEN: Under a recent decision of the circuit court of the United States for the western district of this circuit, to which my attention has been called by James Parsons, esq., register in
12 bankruptcy, it becomes my duty, as assignee in bankruptcy of Wattson & De Young, to demand from you the return under your refunding receipt of June 13, 1871, of all the rent received by you on that date from Charles Vezin, former assignee of Wattson & De Young, bankrupts, that accrued up to the time of his appointment as assignee. Will you favor me by a prompt response to this demand, & much oblige,

"Yours truly,

"J. COOKE LONGSTRETH,
"*Assignee in Bankruptcy of Wattson & De Young.*"

The said defendants having refused to comply with this demand, this action was brought. A dividend of three per cent. has been made to the general creditors out of the bankrupt's estate on the amount of debts proved, $54,754.56, such dividend amounting, in the aggregate, to $1,642.61, and there is a balance in the hands of the plaintiff, as assignee, of about fourteen hundred dollars.

If the court should be of opinion that defendants were entitled, under the facts as above stated, to demand & receive the full amount of their claims so paid to them as above, judgement to be entered for de-
13 fendants; but should the court be of opinion that the whole or any part of such payment ought not to have been made by the assignee, the judgement for plaintiff for such amount as under said facts he may be entitled to recover.

J. COOKE LONGSTRETH,
Attorney for Plaintiff.
JOS. B. TOWNSEND,
Att'y for the Defendants.

14 *Copy of lease.*

We, Osborn Wattson and Joseph B. De Young, trading under the firm of Watson & De Young, have leased from Abraham L. Pennock, in his own right, and Abraham L. Pennock & David Sellers, trustees for Mary Lewis, for the term of one year, commencing on the first day of January next, to be fully ended and completed on the first day of January, 1869, the front store & counting-room on the first floor of the building No. 533 Market st., in the city of Philadelphia; the water-closet on said floor, the front vault, & front portion, sixty-two feet deep, of the basement of said building, with the right to the use in common of the back entrances to the premises leased to us on the first floor, and the right to the use of the front heater and of the front bin to be erected in the back portion of the basement, at the rent of five thousand dollars per annum, payable quarterly.

The premises shall be kept by us in like good order & condition as when received, and, at the expiration of this lease, shall be surrendered to the lessors in like good order & condition, reasonable wear & use excepted.

The ashes, if not immediately removed from the basement, shall be deposited by us in the bin above referred to, and not allowed to ac-
15 cumulate beyond its capacity, and shall all be removed by us before the termination of this lease.

In order that the other occupants of the building may have the use of their rights as tenants, or otherwise, and not be put to inconvenience, it is understood that the back front of the first story, the care of opening & closing the whole of which shall devolve upon us, shall be opened by us at 7 a. m. and not closed by us until sunset, or 6 p. m.

Neither the above premises or any portion of them shall be sublet, nor shall this lease be assigned without the written consent of the lessors.

No use or occupation of the premises shall be made by us which shall impair the insurance, or without the consent of the insurance companies who have granted policies on the building.

Philadelphia, Dec. 19, 1867.

OSBORN WATTSON. [SEAL.]
JOSEPH B. DE YOUNG. [SEAL.]

Signed, sealed, and delivered in presence of us—
SAM B. HANIER.
JAMES MCDERMOTT.

(Endorsed.)

Subsequently to the date of this lease a portion of the basement, about 30 feet deep, adjoining the front portion, 62 f't deep, was further leased to them, the additional space including the front heaters. The rent for the year which commenced 1 mo. 1, 1870, was reduced to $4,500.

16 And afterwards, to wit, on the ninth day of October, in the year last aforesaid, it is considered by the court here that the said J. Cooke Longstreth, assignee as aforesaid, take nothing by his said writ; but that he be in mercy, &c.

And it is further considered by our said court here that the said defendants do recover against the said plaintiff the sum for their

costs and charges by them laid out about their defence in this behalf, by our said court now here adjudged to the said defendants, with their assent, &c.

17 And afterwards, to wit, on the fourteenth day of December, in the year 1872, comes the said plaintiff and files his assignment of errors, which are as follows, to wit:

Assignment of errors.

1. The court below erred in entering judgement for defendants on the case stated.
2. In not entering judgement for plaintiff on the case stated.

J. COOKE LONGSTRETH,
Att'y for Pl'ff in Error.

18 UNITED STATES,
Eastern District of Pennsylvania, sct:

To George Pennock, executor of Abraham L. Pennock, deceased, and David Sellers, surviving trustee of the estate of Mary Lewis:

Whereas, by a writ of error issuing out of the Supreme Court of the United States, directed to the judges of the circuit court of the United States holden in and for the eastern district of Pennsylvania, wherein J. Cooke Longstreth, assignee in bankruptcy of Osbourn Wattson and Joseph B. DeYoung, trading as Wattson and De Young, bankrupts, is the plaintiff, the said judges are directed to send the record and process of a certain suit, with all things concerning them, so that the same may be had before the justices of the Supreme Court of the United States, on the first Monday of December next, at the city of Washington, in which suit the said J. Cooke Longstreth, assignee in bankruptcy of Osbourn Wattson and Joseph B. De Young, trading as Wattson
19 and DeYoung, bankrupts, is the original plaintiff, and you, the said George Pennock, executor of Abraham L. Pennock, deceased, and David Sellers, surviving trustee of the estate of Mary Lewis, are the original defendants, in a plea of trespass on the case, &c., that the record and process aforesaid, being inspected, they, the said justices of the Supreme Court of the United States, may cause to be done thereupon what of right ought to be done; and the said J. Cooke Longstreth, assignee, &c., having made an assignment of errors, and given good and sufficient security that the plaintiff in error shall well and truly prosecute his said writ of error to effect and answer all such costs as, upon an affirmance of the judgment of the said circuit court, may be adjudged to the defendants in error, you are hereby cited to appear (if you see cause) at the said Supreme Court at the time and place aforesaid, to answer to said writ of error and the errors assigned by the said J. Cooke Longstreth, assignee, &c.

Given under my hand and seal this fourteenth day of Decem-
20 ber, one thousand eight hundred and seventy-two.

W. STRONG,
Asso. Just. S. C. U. S.

(Endorsed:) I accept service of the within citation, and request the clerk of the Supreme Court of the United States to mark my appearance for the defendants in error.

JOS. B. TOWNSEND,
Att'y for George Pennock, Ex'r, and David Sellers, Trustee.

PHIL'A, *Jan'y 13th*, 1873.

21 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Samuel Bell, clerk, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a certain action therein lately depending between J. Cooke Longstreth, assignee, &c., plaintiff, and George Pennock, executor, &c., defendants.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit c't at Philadelphia, this eighteenth day of January, A. D. 1873, and in the ninety-seventh year of the Independence of the said United States.

[SEAL.] SAMUEL BELL, *Clerk.*

22 UNITED STATES,
Eastern District of Pennsylvania, sct:

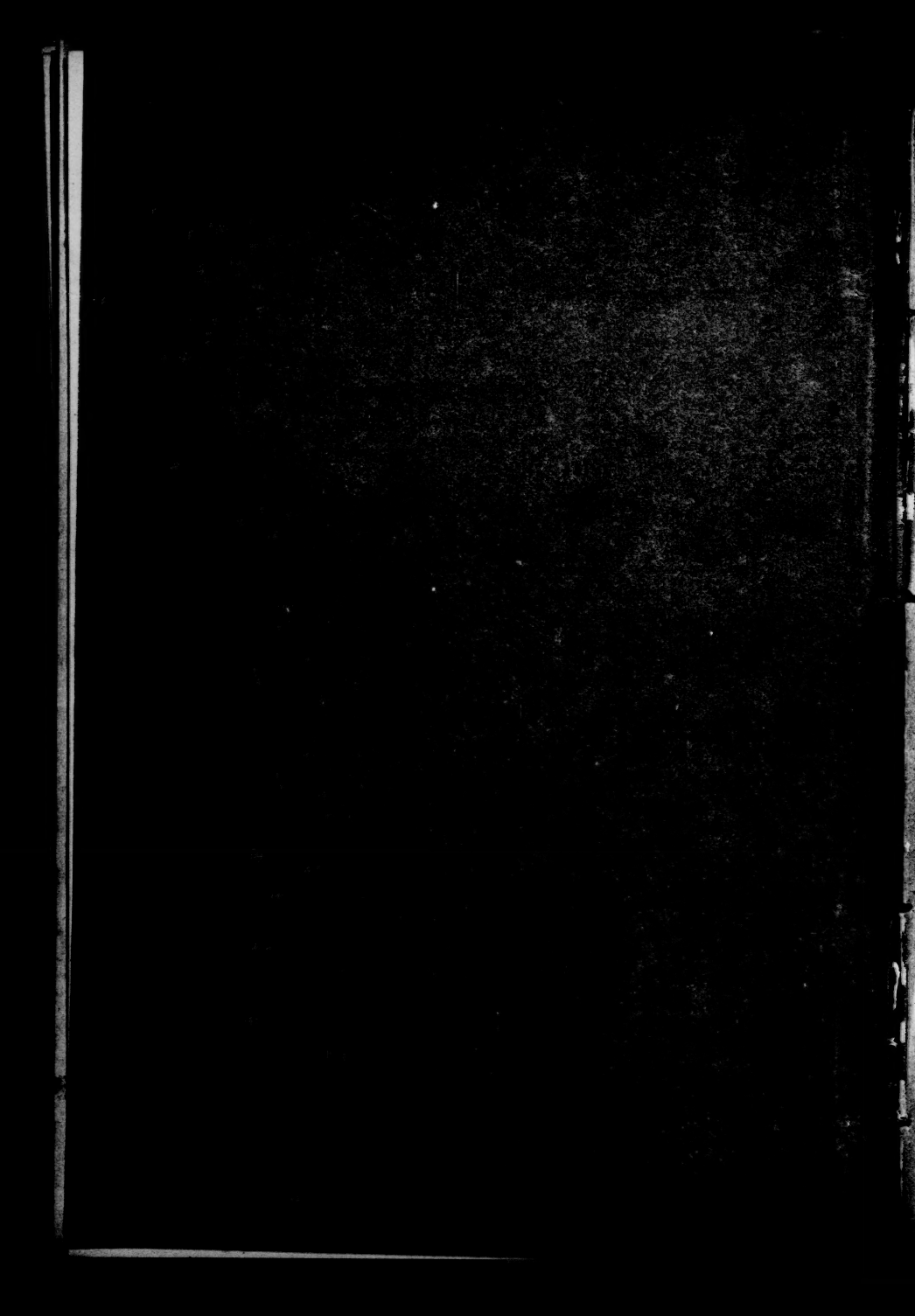
The President of the United States to the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, greeting:

Because that, in the record and process and also in the rendering of judgment in a suit before you, between J. Cooke Longstreth, assignee in bankruptcy, of Osbourn Wattson and Joseph B. De Young, trading as Wattson & De Young, bankrupts, plaintiff, and George Pennock, executor of Abraham L. Pennock, dec'd, and David Sellers, surviving trustee of Mary Lewis, defendants in a plea of trespass on the case, &c., a manifest error has intervened to the great damage of the said J. Cooke Longstreth, assignee in bankruptcy of Osbourn Wattson and Joseph B. DeYoung, trading as Wattson & De Young, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf: You are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the justices of the Supreme Court at the city of Washington on the first Monday of December next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honourable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this fourteenth day of December, A. D. one thousand eight hundred and seventy-two, and in ninety-seventh year of the Independence of the said United States.

[SEAL.] W. GRIER HIBLER,
Pro. Clerk, C. C. U. S.

(Indorsement on cover:) No. 411. J. Cooke Longstreth, assignee in bankruptcy of Osbourn Wattson and Joseph B. DeYoung, trading as Wattson & De Young, plaintiff in error, vs. George Pennock, executor of Abraham L. Pennock, deceased, and David Sellers, surviving trustee of the estate of Mary Lewis. E. Pennsylvania C. C. U. S. Filed 3 March, 1873.



IN THE

SUPREME COURT OF THE UNITED STATES.

No. 411.

LONGSTRETH

vs.

PENNOCK.

BRIEF OF PLAINTIFF IN ERROR'S ARGUMENT.

COLLINS, Printer.

SUPREME COURT OF THE UNITED STATES.

No. 411.

LONGSTRETH
vs.
PENNOCK.

Writ of Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief of Argument for Plaintiff in Error.

THIS Writ of Error raises the question, whether in Pennsylvania the landlord of demised premises has a right of priority of payment of rent out of the proceeds of sale of goods on the demised premises, the title to which has passed to an assignee in bankruptcy of the lessee, and which have been sold by him, the landlord not having distrained on said goods for the rent in arrear.

Section 27 of the Bankrupt Act, expressly excludes any priority or preference, save in excepted cases, of which rent is not one. The priority claimed then must rest upon the assumption that the goods passed to the assignee, subject to a lien for rent. That is the ground of decision In Re Wynne, 4 National Bankruptcy Register, 5, where C. J. Chase says: "If a lien for rent existed, it was a lien to be "discharged by the assignee, and enforced in the United "States Court of Bankruptcy. If it did not exist it could "not be brought into existence by any proceedings what-"ever." The lien must be a perfected lien, as in Marshall *v.* Knox, 16 Wallace, p 551, not one *in posse* merely, as In Re Joslyn *et al.*, 3 Nat. Bank. Reg. 118, in which Judge

Drummond decided that where no distress warrant had been issued prior to the filing of the petition in bankruptcy, the landlord could have no priority or preference over the general creditors. The case In Re Butler, C. C. U. S. Western District of Pennsylvania, 6 Nat. Bank. Reg., p. 501, decided that in the absence of a distress for rent the bankrupt act gives the landlord no lien or preference over the bankrupt's other creditors.

This was at variance with the decision of the District Court of the United States for the Eastern District of Pennsylvania, In Re Appold, 7 American Law Register, N. S. (16th of whole series) p. 624, in which the right of priority seems to have been rested by the learned Judge, mainly upon the equity of the Pennsylvania statute, giving the landlord, in cases where goods on demised premises had been taken in execution, at the suit of another, a right of priority of payment out of the proceeds of sale of such goods. That supposed equity is applied upon the assumption that the warrant in bankruptcy is a statutory execution, and that because the Legislature of Pennsylvania had chosen in other cases of execution, to compensate the landlord for the loss of his right of distress, and make him a preferred creditor, therefore the same benevolence was to be extended to him in cases arising under the bankrupt law. But it is to be observed that the warrant in bankruptcy is only an execution in the sense that it vests the right of possession, and the bankrupt's title to the goods in the assignee, for purposes of conversion for the equal benefit of the bankrupt's creditors. And so in the latter part of the learned Judge's opinion, in that case, he is drawn to the position that the beneficial interest of the debtor, in goods liable to distress for rent, only covers the surplus of interest in the goods above the rent. Now I maintain that the debtor's title is the whole dominion in the goods, subject only to the dominion of some one else who may have a right of pledge or lien for an antecedent debt, and that between a right of priority of payment out of proceeds, and a qualified

right of property in the way of lien or pledge, there is a radical, and not merely a formal or verbal difference, and that when the bankrupt law forbids mere priorities, no equity out of motives of benevolence to the creditor can convert a priority of payment out of proceeds of sale of goods, under a State law, into a charge, lien, or pledge, on or of the goods themselves.

The question, then, as to whether the landlord had any lien upon the goods prior in date to the proceedings that vested the title to them in the assignee, is a question of Pennsylvania State law.

The right of distress in Pennsylvania is the common law right. Its statutes concern themselves mainly with the modes of making the distress available. As respects goods on demised premises, there is no prohibition against their removal, such as in the New Jersey statute under which Judge Nixon, *In Re* Dunham and Hawks, 27 Leg. Int. 404, held that the landlord in that State had a lien on the goods. In the case of Grace *v.* Shively, 13 S. & R. 217, a case arising under the Pennsylvania statute, extending the right of distress to goods fraudulently removed from the premises for thirty days after such removal, Chief Justice Tilghman states the law thus: "The tenant is not bound "to give notice to the landlord that he is about to remove "his goods, nor is he under any obligation not to remove "them. It is the landlord's business to be vigilant. He "has a right to distrain whenever the rent has become due; "and if he neglects it he runs the risk of losing this extra-"ordinary remedy with which the law has favored him." This would seem to be conclusive on the question of lien, for a lien cannot be divestible at the will of the debtor.

In Greider's Appeal, 5 Barr, p. 422, a case arising under the Pennsylvania statute, heretofore referred to, giving priority of payment of rent out of the proceeds of sale of goods liable to distress taken in execution (83d and 84th sections of act of June 16, 1836, Pamphlet Laws, p. 777), it was decided that by a surrender of the term after execu-

Drummond decided that where no distress warrant had been issued prior to the filing of the petition in bankruptcy, the landlord could have no priority or preference over the general creditors. The case In Re Butler, C. C. U. S. Western District of Pennsylvania, 6 Nat. Bank. Reg., p. 501, decided that in the absence of a distress for rent the bankrupt act gives the landlord no lien or preference over the bankrupt's other creditors.

This was at variance with the decision of the District Court of the United States for the Eastern District of Pennsylvania, In Re Appold, 7 American Law Register, N. S. (16th of whole series) p. 624, in which the right of priority seems to have been rested by the learned Judge, mainly upon the equity of the Pennsylvania statute, giving the landlord, in cases where goods on demised premises had been taken in execution, at the suit of another, a right of priority of payment out of the proceeds of sale of such goods. That supposed equity is applied upon the assumption that the warrant in bankruptcy is a statutory execution, and that because the Legislature of Pennsylvania had chosen in other cases of execution, to compensate the landlord for the loss of his right of distress, and make him a preferred creditor, therefore the same benevolence was to be extended to him in cases arising under the bankrupt law. But it is to be observed that the warrant in bankruptcy is only an execution in the sense that it vests the right of possession, and the bankrupt's title to the goods in the assignee, for purposes of conversion for the equal benefit of the bankrupt's creditors. And so in the latter part of the learned Judge's opinion, in that case, he is drawn to the position that the beneficial interest of the debtor, in goods liable to distress for rent, only covers the surplus of interest in the goods above the rent. Now I maintain that the debtor's title is the whole dominion in the goods, subject only to the dominion of some one else who may have a right of pledge or lien for an antecedent debt, and that between a right of priority of payment out of proceeds, and a qualified

right of property in the way of lien or pledge, there is a radical, and not merely a formal or verbal difference, and that when the bankrupt law forbids mere priorities, no equity out of motives of benevolence to the creditor can convert a priority of payment out of proceeds of sale of goods, under a State law, into a charge, lien, or pledge, on or of the goods themselves.

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In Greider's Appeal, 5 Barr, p. 422, a case arising under the Pennsylvania statute, heretofore referred to, giving priority of payment of rent out of the proceeds of sale of goods liable to distress taken in execution (83d and 84th sections of act of June 16, 1836, Pamphlet Laws, p. 777), it was decided that by a surrender of the term after execu-

tion levied, the landlord's right of priority was gone. This could not have been the case had the landlord acquired a fixed lien on the goods by virtue of the levy of the execution.

In the case of Singerly *v.* Fox, decided by the Supreme Court of Pennsylvania, January 19, 1874, and reported in the Legal Intelligencer for that year, p. 37, it was held that the landlord buying goods at a public sale, made by a receiver in equity of his tenant's effects on the demised premises, could not set off his claim for rent in an action by the receiver for the amount of his bid.

Gordon, J., delivering the opinion of the court, says: "We may say, in conclusion, that it is a mistake to sup- "pose that the defendant had a lien upon the goods by "virtue of his lease. The act of Assembly requires the "sheriff to pay out of the proceeds of his levy and sale of "the tenant's goods to the landlord a sum not exceeding "one year's rent, but this is by virtue of the directions of "the act in that special case, and not because of any lien. "This act is, no doubt, based upon the idea that it would "be in equitable to take from the landlord that which he "regards as his security for his rent, and which he might "at any time seize by virtue of his warrant. But in this "case there is no such equitable consideration in Singerly's "favor, inasmuch as he stands upon the same footing as "other creditors of the firm, and will share the proceeds "with them."

The 19th section of the Bankrupt Act, providing for proof of apportioned rent, shows that Congress did not intend to give the landlord any preference. To allow such a priority as is claimed in this case would certainly detract from the constitutional requirement of uniformity.

J. COOKE LONGSTRETH,
Plaintiff in Error.

In the Supreme Court of the United States.

No. 411.

LONGSTRETH, Assignee in Bankruptcy,

v.

PENNOCK AND OTHERS.

Writ of Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF OF ARGUMENT FOR DEFENDANTS IN ERROR.

The question presented by this record is whether a landlord, in Pennsylvania, against whose tenant, duly adjudged bankrupt, a warrant in bankruptcy has been issued in accordance with the bankrupt acts, has a right to the payment of the arrears of rent up to the time of such warrant and seizure, not exceeding one year's rent, out of the proceeds of the chattels of the bankrupt in and upon the demised premises, which the assignee in bankruptcy has taken and sold.

The defendants in error rented a warehouse on Market Street, in the city of Philadelphia, to Wattson & De Young, at the yearly rent of $4500, payable in equal quarterly instalments. Wattson & De Young, the lessees, were in possession of the demised premises, and had therein a stock of goods at the time they were adjudicated bankrupts. Their assignee went into possession of the said demised premises, and of the stock of the bankrupts, and held and occupied

the real estate until he had accomplished the sale of the chattels and property of the bankrupts thereon.

The claims of the landlords (the defendants in error) for the rent were of twofold character:—

I. The rent due and accrued up to the date of the issuing of the warrant in bankruptcy.

II. The rent accruing thereafter until the surrender and delivery of the real estate by the assignee after he had completed the sale.

The payment of the last-named portion of the rent has not been resisted; it has been paid and allowed by the court below as one of the incidental expenses of the due administration of the estate by the assignee.

But the first-named portion of the rent, *i. e.*, that accruing up to issuing of the warrant in bankruptcy, having been paid to the landlords under a stipulation to restore the same if the assignee was not allowed credit therefor on the settlement of his account, this action is brought to test the right of the assignee in bankruptcy to get back what was so paid for rent accruing prior to the warrant, which was for much less than a year's rent. The Circuit Court (Justices Strong, McKennan, and Cadwalader all hearing the arguments and concurring in the conclusion), decided that the payment was rightfully made, and that the assignee could not recover it back.

Whatever changes may have been brought about by time in the relations between landlord and tenant—whatever easing of the feudal burdens imposed upon the tenant under the ancient tenures of England, there still remains, under the laws of almost every State in the Union, a recognition that, in consequence of the tie or connection between them, the landlord, for the rent accruing upon and out of the demised property, has certain incidental rights and remedies which are beyond and above those attached to ordinary debts or claims; chief of these is the right of seizure or distress. This power of extra-judicial and summary redress only arises because of the tenancy,

and can only be exercised against chattels on the demised premises, or fraudulently removed therefrom to avoid distress.

This power and right in the landlord is as old as the common law itself, and has always been recognized in Pennsylvania as existing at common law; and various statutes in aid of and for the further extension of the remedy have been passed. (See Appendix.) This exceptional power and right of summary redress are not allowed to remain in the law, in the interest of the landlord alone. But the tenant, by the contract under which he holds the house to shelter his family, or the warehouse or shop wherein he stores his goods or plies his trade or calling, having subjected his goods on the premises to the exercise of this right on the part of his landlord, well knows that it serves him in procuring a temporary indulgence, and, but for this remedy, payment in advance, or other harsher terms, would be required.

It is admitted that no distress was made for the rent in this case. So powerful is the right of the landlord that, in England, he is allowed to make his distress on the goods on the demised premises, after the title has passed to the bankrupt assignee, and even after the latter has sold, if the goods be not removed. (Bradby on Distresses, 1 Law Library, 52 [*85].)

Under our bankruptcy system it will not be tolerated that the landlord shall interfere with the grasp of the assignee in bankruptcy. (*In re* Charles Wynne, involuntary bankrupt, U. S. Circuit Court of Virginia, 4th vol. Bankrupt Register, p. 5, per Chase, C. J.; *In re* Appold, involuntary bankrupt, 7 Am. Law Reg., new series, p. 625.) But because under our system we compel the landlord to stand aloof, and *take away his power and right to distrain* after the transfer in bankruptcy has taken place, for a technical reason his remedy, thus taken away by statute—and very reason it—and law, must be compensated to him out of the property of payment the same high power which displaces his

the real estate until he had accomplished the sale of the chattels and property of the bankrupts thereon.

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will surely do him the justice to make compensation to him for the right he has been deprived of.

Much stress, in the argument for the other side, is laid upon the question whether the landlord has any lien upon the goods of his tenant; but whether the landlord's power or right of seizure for arrears of rent due shall confer upon him what the law will designate by the name of a lien, or not, is not material to be inquired into; it is a power and right of summary and immediate redress for security and protection in payment growing out of the relation of the parties, and recognized by the law. And when, before its exercise, the paramount authority of the law makes a seizure in bankruptcy, there is, under the bankrupt acts of the United States, the intent to preserve the rights of all whose interests may be involved in such seizure, be they bailees, landlords, factors, or others who have rights or remedies superior to those of general creditors. This is much better than the English rule, because it passes the legal title of the property to the assignee, and will prevent his disposition and conversion of them from being interfered with by parties asserting specific or special rights therein, when such specific or special rights or claims against the same can better be ascertained and provided for in the distribution of the proceeds thereof after a sale.

The statute of Pennsylvania in respect to the right of the landlord to have his rent (not exceeding one year's) out of the proceeds of his tenant's goods on the demised premises which shall be seized in execution and sold at the suit of other creditors of the tenant, is that of 16th of June, 1836. (See Appendix.)

Under the decisions in Pennsylvania, after the sheriff has seized in execution at the suit of any creditor other than the landlord, such landlord will not be allowed, under a distress, to disturb the sheriff's seizure and holding; he will be remitted to his claim on the proceeds raised by the sheriff's sale, and on them he has a right to

* This act is in substitution of the act of 21 March 1772, see 1 Dallas' Laws 364, under which see Wheat. Dig. Brightly 2 Vol. 274

priority of payment to the extent of not exceeding one year's rent, before the execution creditor shall get the residue.

But after the sheriff has so seized under the execution of a general creditor, his holding is for the benefit both of the landlord and the execution creditor; and the latter cannot without the landlord's consent stay the proceedings under his execution. See sec. 85 of act of 16 June, 1836, printed in Appendix.

This statute is simply declaratory of the common law, and upon the same principle, a warrant in bankruptcy, being a general execution or seizure of the whole estate of the bankrupt for the use of his creditors, comes within the spirit and equity of the statute law of Pennsylvania: Appold's Case, 7 Am. Law Reg., New Series, 624.

Coming to consider the cases cited on the other side, it will be found on examination that the decision of Judge Nixon, *In re* Dunham & Hawks, Involuntary Bankrupts—reported in 27 Legal Intell., p. 404—makes for the defendants in error.

The case is not substantially different from the present—for there is no material difference between the Pennsylvania statute and that of New Jersey, under which Judge Nixon held that the landlord in that case was entitled to priority of payment of his rent accruing up to seizure in bankruptcy out of the proceeds of his bankrupt tenant's chattels on the demised premises.

The case of Grace *v.* Shively, 13 S. & R. 217, quoted by the plaintiff in error, is an authority in support of the proposition that the landlord who has made no actual distress or seizure, has no lien on the goods of his tenants on the demised premises, which will enable him to follow and seize them after a removal, which is not fraudulent.

We have not advanced the position that there is a technical lien on the goods—our case does not require it—and the assumption that there can be no priority of payment unless there be a lien is fallacious.

*

For the same reason Greider's Appeal, 5 Barr, 422, is inapplicable to the present case. There the landlord had done an act which took away his right and power to make a distress, even if there had been no execution against his tenant; of course, if he had no such right or power of distress to be tolled or taken away by the strong arm of the law, he had no equity or right to appeal to the law for compensation or priority.

Neither has the case of Singerly *v.* Fox, reported in the Legal Intelligencer of Jan. 19, 1874, p. 37, cited against us, any application; it will be found that it was a case in which a receiver by order of court was put into possession of a partnership stock of goods, with order to convert the same by sale and bring the proceeds into court for distribution. The effort of the landlord to get his rent by claiming a set-off against the price of the goods he had bought at the receiver's sale, was defeated—and the existence of a specific lien on the goods, where no actual seizure under distress had been made, was denied. But nothing was decided in that case touching the landlord's right to have priority of payment of his rent, when the proceeds of the goods are paid in and under the control of the court.

Touching the question of uniformity provided for in the Constitution, it has been decided that the uniformity required is that the Bankrupt Acts, *per se*, shall introduce no varying schemes for the seizure, conversion, and distribution of the estates of bankrupts. Provided they, in their sphere, act in all States and upon all citizens alike, their uniformity will not be deemed to have been broken into, where in the distributions made under them, they recognize and protect special rights and equities attaching under the laws of each State in favor of particular creditors. It is the very essence of their uniformity, that while they do require the seizure and conversion of all the bankrupt's property, they will recognize, in their disposition of the proceeds, any special rights which may have inhered in them in favor of other than general creditors, where such

rights have in good faith attached prior to bankruptcy under the common or statute laws of each State.

The question now before the court has not been decided adversely to the landlord's right so far as we have been able to discover, except in the case of Butler in 6 Bankruptcy Register, page 501, and Austin *v.* O'Reilly, Assignee, from Southern District of Mississippi, 8 Bankruptcy Register, 129.

Against these, we have the following in support of the landlord's right to priority of payment of test rent not exceeding one year:—

In re Trim, Purcell & Wagner, South Carolina, 5 vol. Bankruptcy Register, p. 23, per Bryan, District Judge.

In re Appold, 7 American Law Register (new series), 16 of whole series, p. 624. Eastern District of Pennsylvania, per Cadwalader, District Judge.

In re Dunham & Hawks, 27 Legal Intelligencer, 404, New Jersey, per Nixon, District Judge.

In re Wynne, 4 Bankruptcy Register, p. 4, per Chase, C. J., sitting at Circuit in Virginia. And in the present case where the decision of the Circuit Court was concurred in by all the judges sitting—Strong, McKean, and Cadwalader.

In all the latter cases there had been no actual seizure of the goods by the landlord, under a distress warrant, prior to the bankruptcy.

It is respectfully submitted, therefore—

1. That the Pennsylvania Statute of 1836, which secures to the landlord his rent (not exceeding a year's), out of the proceeds of the tenant's goods seized in execution, in and upon the demised premises, conferred such right upon the landlords in this case, because a seizure in bankruptcy is within the spirit, true intent and equity of that act—it being in effect an execution because it is founded upon a judicial order, that the chattels of the bankrupt be seized and sold, and the proceeds thereof applied to the use of creditors.

2. That independent of the Pennsylvania statute, the practice in bankruptcy in the United States being to hold the power of distress on the landlord's part, as adeemed and taken away by a seizure in bankruptcy against his tenant, contrary to the English practice; it follows that protection to the landlord's claim for rent in all States of the Union wherein the right of distress exists at common law or under State statutes, should and ought to be furnished out of the proceeds, because the law will not by its act deprive the landlord of a remedy which would procure him payment of his claim without providing reparation of compensation.

The statutes of Pennsylvania which are deemed to be applicable to the question before the Court, are furnished in the Appendix to this Brief.

JOS. B. TOWNSEND,
For the Defendants in Error.

APPENDIX

CONTAINING SOME OF THE STATUTES OF PENNSYLVANIA IN RELATION TO LANDLORD AND TENANT.

It shall and may be lawful for any person or persons having any rent in arrear or due upon any lease for life or lives, or for one or more years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such leases had not been ended or determined: *Provided*, That such distress be made during the continuance of such lessor's title or interest.

Act of Assembly of 21 March, 1772, § 14, Purdon's Digest, 1873, page 876.

In case any lessee for life or lives, term of years, at will, or otherwise, of any messuages, lands or tenements upon the demise whereof any rents are or shall be reserved or made payable, shall, from and after the publication of this act, fraudulently or clandestinely convey or carry off or from such demised premises, his goods and chattels, with intent to prevent the landlord or lessor from distraining the same for arrears of such rent so reserved as aforesaid, it shall and may be lawful to and for such lessor or landlord, or any other person or persons, by him for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or such carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels wherever the same may be found, as a distress for the said arrears of such rent, and the same to sell or otherwise dispose of, in such manner, as if the said goods and chattels

21 March, 1772, § 4, Purdon's Digest, 1873, page 877.

had actually been distrained by such lessor or landlord in and upon such demised premises, for such arrears of rent.

Ibid., § 6. *Provided*, That nothing herein contained shall extend, or be deemed or construed to extend, to empower such lessor or landlord to take or seize any such goods or chattels as a distress for arrears of rent, which shall be, *bona fide* and for a valuable consideration, sold before such seizure made, to any person or persons not privy to such fraud as aforesaid, anything herein contained to the contrary notwithstanding.

16 June, 1836, § 83, Purdon's Digest, 1873, page 579. The goods and chattels being in or upon any messuage, lands or tenements, which are or shall be demised for life or years, or otherwise taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution: *Provided*, That such rent shall not exceed one year's rent.

Ibid., § 84. After the sale by the officer, of any goods or chattels as aforesaid, he shall first pay out of the proceeds of such sale, the rent so due, and the surplus thereof, if any, he shall apply towards satisfying the judgment mentioned in such execution: *Provided*, That if the proceeds of the sale shall not be sufficient to pay the landlord, and the costs of execution, the landlord shall be entitled to receive the proceeds, after deducting so much for costs as he would be liable to pay in case of a sale under distress.

Ibid., § 85. Whenever any goods or chattels liable to the payment of rent as aforesaid, shall be seized in execution, the proceedings upon such execution shall not be stayed by the plaintiff therein, without the consent of the person entitled to such rent, in writing, first had and obtained.